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Nos. 88-1176 and 88-1184

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON and L. LEE BEARDSLY, ET AL.,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Cross-Respondents.

CROSS-RESPONDENT UNITED TRANSPORTATION UNION'S MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

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United Transportation Union ("UTU"), cross-respondent herein, respectfully submits that it is apparent the cross-petitions filed by the employees of the former Chicago, Rock Island & Pacific Railroad Company ("Rock Island") in Nos. 88-1176 and 88-1184 further support a grant of the cross-petition for writ of certiorari filed by UTU in No. 88-1169, along with the petitions filed by the Brotherhood of Locomotive Engineers ("BLE") in 88-968 and Chicago & North Western Transportation Company ("CNW") in No. 88-994. But UTU submits that the cross-petitions in Nos. 88-1176 and 88-1184 should be denied.

The petitions filed by BLE and CNW, and cross-petition filed by UTU, present a question of exceptional importance, *viz.*, whether a court of appeals may provide an arbitration remedy for employee-members seeking to set aside a seniority implementing agreement, when that court has held that the action to set aside that agreement was time-barred under the six-month limitations period set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and those employees' substantive claims did not lie in federal court.

The UTU cross-petition in 88-1169 also raises inextricably related questions of whether the arbitration award at issue may be vacated in the absence of bad faith and carrier collusion, and whether a court may substitute its judgment for that of the union in construing a union constitution in the absence of a finding of bad faith.

CNW filed the petition in No. 88-994, which raises questions as to whether the suits were timely filed in seeking an order to compel interest arbitration, *i.e.*, arbitration as to the substantive provisions of seniority issues already negotiated between the authorized bargaining representatives, and whether the timeliness of the arbitration ordered by the court of appeals is to be determined by the doctrine of laches, as the court below decided, or the six-month *DelCostello* limitations rule.

These cross-petitions, on the other hand, raise additional fact-specific issues not worthy of consideration by this Court which are not needed to resolve the effect of the court of appeals' order upon the seniority implementing agreements. More specifically, all of the petitions address the principal issue of the effect of that order

upon the rights the parties would otherwise have in connection with resolving the disputes associated with the employment rights and seniority arising out of the acquisition of the lines of the former Rock Island by CNW. These cross-petitions raise issues which complicate the analysis and resolution of the effect of the direction to compulsory arbitration of the adequacy of the former Rock Island employees' seniority rights upon the rights of rail labor and management to negotiate upon that subject under the March 4th Agreement and laws governing railroad labor relations.

Cross-petitioners suggest that a two-year limitations period, adopted from Section 3, First(r) of the Railway Labor Act, 45 U.S.C. 153, First(r) should be applied to all claims arising in the railroad industry, including hybrid claims, even though the doctrine of the duty of fair representation was first enunciated under the Railway Labor Act ("RLA"), and the six-month *DelCostello* period has been uniformly applied in RLA breach of duty of fair representation cases.

Cross-petitioners also make an amorphous, fact-specific claim that the courts below failed to properly review the record as to the facts supporting their view of the appropriate accrual date for their claims and their definition of equitable tolling doctrines, although they clearly rely on their mere allegations in the complaints.

STATEMENT OF CASE

Detailed statements of the facts are set forth in the petitions in Nos. 88-968 and 88-994 and the cross-petition

in 88-1169. Cross-petitioners' statement does not discuss the findings and conclusions made by the trial court as to the date of accrual of their claims and the inapplicability of the discovery and fraudulent concealment tolling doctrines.

Cross-petitioners' evidence in the district court went to the fair representation issue as to the ground service employees, who were among those represented by UTU, and were the subject of the award of Arbitration Board No. 456 handed down on May 20, 1983. The original complaints in *Newton, et al. v. Chicago & N.W. Transp. Co., et al.*, No. 83-641-D (S.D. Iowa), and in *Reece, et al. v. CNW, et al.*, No. 83-640-B (S.D. Iowa), were filed on November 18, 1983, two days prior to expiration of the six-month period from issuance of this award, thereby indicating familiarity with the six-month period from *DelCostello*. *See*, Cross-Petitioner's Appendix in No. 88-1169 (hereafter "Pet. App.") at 24a.

In its April 16, 1986 decision, the district court held that the claims of the engine service employees represented by BLE and UTU in *Newton* accrued on February 16, 1982, the date the implementing agreements were signed, "because (a) the injury about which plaintiffs complain became 'fixed and reasonably certain' at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. *See, Hafer v. Air Line Pilots Association*, 525 F.Supp. 874, 877 (D. Hawaii 1981), *aff'd*, 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association*, 609 F.2d 934 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980)." (Pet. App. 109a).

Cross-petitioners sought to avoid the time bar on the ground that the so-called "discovery rule" applied and "by asserting that the running of the limitations period was postponed until after May 18, 1983 because of 'fraudulent concealment' by the unions." (Pet. App. 110a, 111a).

As to the discovery rule, the district court stated:

> . . . None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983. (Pet. App. 111a).

The district court also rejected the argument that the "fraudulent concealment" tolling doctrine applied to their claims, finding that none of the individuals "demonstrate[d] the exercise of due diligence prior to May 18, 1983." (Pet. App. 112a). In addition, the district court found that "neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW." (*Id.*).

The Eighth Circuit agreed that the claims for breach of the duty of fair representation, except for the UTU-represented ground service employees, were "governed by the six-month statute of limitation set forth by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983)." (Pet. App. 24a).

ARGUMENT

Every court of appeals which has decided the issue, has decided the *DelCostello* limitations period applies to breach of the duty of fair representation claims under the Railway Labor Act. (See UTU Cross-Pet. in No. 88-1169 p. 14).

As noted by the first district court to consider the issue in *Linder v. Berge*, 567 F. Supp. 913, 916 (D.R.I. 1983), *aff'd*, 739 F.2d 686 (1st Cir. 1984):

> [T]he duty of fair representation is implied in the union's right to represent all members of the craft, and is not grounded on a specific statutory command. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In fact, the duty of fair representation initially arose in the roundhouse of railway labor relations, *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-04 (1944), and was only thereafter applied to unions regulated under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). Thus, it is of little moment vis-a-vis the case at bar that the Supreme Court's decision in *DelCostello* was announced against an NLRA backdrop.

If a different limitations period were applied to claims under the RLA, "the congressional will would be thwarted, the rationale of the Supreme Court in *DelCostello* would be undercut, and an inexplicable asymmetry between railroad workers and other union members in the fashioning of remedies for alleged breaches of essentially the same fair representational duty of their respective unions would senselessly be engrafted upon the law." *Id.* at 917.

The fact-specific issues cross-petitioners raise regarding the application of summary judgment principles to

the accrual and tolling issues raised by them have been settled by this Court's decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Fed.R.Civ.Pro. 56(e) specifically places on the non-movant the responsibility of countering motions for summary judgment with affidavits or other proper evidence. When CNW, BLE and UTU moved for summary judgment below, and bore their burden of demonstrating the absence of a genuine issue of material fact as to accrual of the claims, the "non-movant party must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra*, 475 U.S. at 587.

Cross-petitioners were required to designate specific facts supported by discovery or affidavit showing a genuine issue for trial on the accrual and tolling issues. The duty to evaluate the entire record was their duty. These issues are not worthy of this Court's further consideration.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the cross-petition of the United Transportation Union in Docket No. 88-1169, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit on the issues posed therein, incident to a grant of certiorari in Docket

Nos. 88-968 and 88-994. The cross-petitions in Dockets Nos. 88-1176 and 88-1184 should be denied.

Respectfully submitted,

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